2006

Nicole H. Code f.k.a. Nicole L. Handrahan v. Utah Department of Health and Utah School for the Deaf and Blind : Brief of Appellant

Utah Court of Appeals

Brad C. Smith; Benjamin C. Rasmussen; Stevenson & Smith, PC; Attorneys for Appellant.
Brent A. Burnett; Debra J. Moore; Office of Utah Attorney General; Attorney for Appellees.

BEFORE THE UTAH SUPREME COURT

NICOLE H. CODE., f.k.a. NICOLE L. HANDRAHAN, Plaintiff/Petitioner, vs. UTAH DEPARTMENT OF HEALTH and UTAH SCHOOL FOR THE DEAF AND BLIND, Defendants/Respondents.	Case No. 20060372-SC

On Writ of Certiorari to the Utah Court of Appeals

OPENING BRIEF OF APPELLANT

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BEFORE THE UTAH SUPREME COURT

NICOLE H. CODE., f.k.a. NICOLE L. HANDRAHAN, Plaintiff/Petitioner, vs. UTAH DEPARTMENT OF HEALTH and UTAH SCHOOL FOR THE DEAF AND BLIND, Defendants/Respondents.	Case No. 20060372-SC

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Cases

Statutes, Rules, and Constitutional Provisions

Jurisdiction

This Court has jurisdiction to hear appeals from decisions of the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(3)(a).

Issues Presented for Review

This case is before the Court on a Writ of Certiorari. Pursuant to this Court's Order, the sole issue to be considered is "Whether the court of appeals lacked appellate jurisdiction to adjudicate the appeal in this case." Exhibit A, Order Granting Plaintiff's Petition for Writ of Certiorari.

On certiorari, this Court reviews the decision of the Court of Appeals for correctness, giving no deference to its conclusions of law. See, Carrier v. Pro-Tech Restoration, 944 P.2d 346, 350 (Utah 1997).

Controlling Rules

Utah R. App. P. 3

(a) *Filing appeal from final orders and judgments.* An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal as well as the award of attorney fees.

Utah R. App. P. 4

(a) *Appeal from final judgment and order.* In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of the entry of the judgment or order appealed from. ...

Utah R. Civ. P. 7(f)

(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. ...
(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, served upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

Statement of the Case

On July 8, 2004, Plaintiff filed her Complaint in this matter. (R. at 1-5.) An Amended Complaint was filed October 27, 2004. (R. at 55-59.) Defendants filed a Motion to Dismiss the Complaint based on Governmental Immunity. (R. at 10-11, 64-66.) On January 10, 2005, the district court filed a memorandum decision granting Defendant's Motion to Dismiss. (Exhibit B, Memorandum Decision.)

The Court made no instructions regarding the preparation of an order and Defendant did not prepare an order as provided by Utah R. Civ. P. 7. Accordingly, Plaintiff's counsel prepared an order dismissing the case, which was signed by the district court on February 25, 2005. (Exhibit C, Order of Dismissal.)

Plaintiff timely filed its Notice of Appeal from the February 25, 2005 Order of Dismissal. (R. at 76-78.)

Defendants subsequently filed a Motion for Summary Disposition arguing that the Court of Appeals lacked jurisdiction because the district court's Memorandum Decision constituted a final order. Plaintiff responded and on May 19, 2005 the Court of Appeals reserved ruling on the motion pending briefing on the merits. (Exhibit D, Court of Appeals Order.) Subsequent to briefing on the merits of the appeal, the Court of Appeals issued the opinion at issue here on March 23, 2006, dismissing Plaintiff's appeal for lack of jurisdiction. (Exhibit E, Court of Appeals Opinion.)

Summary of Arguments

The appellate courts have jurisdiction over Plaintiff's appeal in this matter as Plaintiff timely appealed from the final order of the district court. Utah R. Civ. P. 7(f) requires that for every court order, the prevailing party shall prepare an order in conformity with the Court's decision, unless the Court signs a previously submitted proposed order, "or unless otherwise directed by the court." While the district court's memorandum decision used language that created an illusion of finality, the district court's decision must be read in light of the guidelines of Rule 7(f). When Rule 7(f) is applied, the district court's decision was not final absent counsel's preparation of an order. Defendants' counsel having chosen not to

prepare an order, Plaintiff's counsel properly prepared the order, and appealed therefrom, thus vesting the appellate courts with jurisdiction.

Argument

I. Given the Language of Utah R. Civ. P. 7(f)(2), the Memorandum Decision of the District Court Was Not a Final Judgment or Order.

"[The Rules of Civil Procedure] shall govern the procedure in the courts of the state of Utah in all actions, suits, and proceedings of a civil nature ... except as governed by other rules promulgated by this court or enacted by the Legislature..." Utah R. Civ. P. 1(a). "When interpreting court rules, we apply our rules of statutory construction with an understanding that rules, like statutes, are 'passed as a whole and not as parts or sections.'" Cox v. Krammer, 2003 UT App 264, ¶10, 76 P.3d 184, citing, State v. Maestas, 2002 UT 123, ¶54, 63 P.3d 621.

Under Utah R. App. P. 3(a), "An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments...by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4." Utah R. App. P. 4 requires an appeal to be filed within 30 days after the entry of the order appealed from. The absence of a final judgment generally deprives the appellate courts of jurisdiction. See, A.J. MacKay Co. v. Okland Const. Co., Inc., 817 P.2d 323, 325 (Utah 1991). Likewise, failure to timely file a notice of appeal following entry of a final judgment

or order deprives the Court of jurisdiction. See, Serrano v. Utah Transit Authority, 2000 UT App 299, ¶7, 13 P.3d 616.

"[A]n order is final where 'the effect of the order ... was to determine substantial rights ... and to terminate finally the litigation...'" Harris v. IES Assoc., Inc., 2003 UT App 113, ¶56, 69 P.3d 297, citing, Cahoon v. Cahoon, 641 P.2d 140, 142 (Utah 1982). The memorandum decision issued by the district court in this case did not finally terminate the litigation.

The Court of Appeals erroneously reached the opposite conclusion. The Court of Appeals focused solely on the last sentence of the district court's memorandum decision, which stated, "For the reasons stated above, the Court dismisses Plaintiff's claim." Under the reasoning of the Court of Appeals, "No further order was invited or contemplated by the terms of the Memorandum Decision, nor is such even implied by the decision's language." Code v. Utah Dep't. of Health, 2006 UT App 113, ¶4, 133 P.3d 438.

However, the reasoning of the Court of Appeals in this regard, which looks only to the language of judicial precedent, runs directly contrary to the governing rules of procedure.[1] Utah R. Civ. P. 7(f)(2) states in pertinent part, "Unless the court approves the proposed order submitted with an initial memorandum, or *unless otherwise directed by the court*, the prevailing party *shall*, within fifteen

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[1]The Rules of Criminal Procedure contain a similar requirement. See, Utah R. Crim. P. 26 (a), (b).

days after the court's decision, serve upon the other parties a proposed order in *conformity with the court's decision.*" (Italics added.) Rule 7(f)(1) defines "order" to include "every direction of the court, including a minute order entered in writing, not included in a judgment."

Under the plain language of Rule 7, for every order, not included in a judgment, the prevailing party is to submit an order in conformity with the court's decision, *unless otherwise directed.* The language of the rule makes such action mandatory. This is clearly at odds with the holding of the Court of Appeals, which held that because the district court dismissed the claim without inviting preparation of an order by counsel, it left nothing more to be done. Code, at ¶6. The Court of Appeals further reasoned that the district court's language, although it did not specifically direct counsel, implicitly directed prevailing counsel not to file a proposed order. Id. However, Rule 7(f) does not invite counsel to divine the intentions of the district court in this regard. Rule 7(f) plainly states that unless the district court signs a previously submitted order, or unless the district court otherwise directs, the prevailing party *shall* prepare an order. Under Rule 7(f), the memorandum decision of the district court explained the court's rationale and set forth the direction of the Court. Action was still required on the part of the Defendant to bring finality to the case. Had Plaintiff appealed from the memorandum decision, the appeal would have been premature and the Court of Appeals would have lacked jurisdiction.

In her concurring opinion, Judge McHugh came closer to the correct analysis, but still missed the mark. She noted the plain language of the rule, but wrote it off as nothing more than a conflict between court precedent and the rule, which "can lead to confusion for practitioners." Code, at ¶11, (McHugh, J. concurring.) Judge McHugh's reasoning was equally misplaced as that of the majority opinion, by concluding that the apparent conflict between appellate court precedent and the Rules of Civil Procedure should be written off as nothing more than potentially confusing.

The likelihood of confusion that Judge McHugh noted in her concurring opinion is abundantly evident in the decision of the Court of Appeals as this case should require nothing more than to read and apply the literal language of Rule 7(f)(2).[2] Indeed, the rule as articulated by the Court of Appeals mischieviously creates more confusion for the members of the bar than it resolves. Instead of relying on the plain application of Rule 7(f) upon receipt of a judge's

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[2]Our research revealed only one appellate opinion where the interplay between finality and Rule 7(f) was even mentioned. In Oseguera v. Farmers Insurance Exchange, 2003 UT App 46, ¶4, 68 P.3d 1008, a district court entered a judgment, which the Court of Appeals noted "precluded the usual circulation among the parties of a proposed judgment and the opportunity to object prior to its entry" under Utah Code Judic. Admin. R 4-504(1), (2) (2003), the predecessor to Utah R. Civ. P. 7(f). The Court of Appeals stated nothing more concerning the issue in the case, nor does it appear to have considered whether the predecessor to Rule 7 may have prevented the finality of a judgment that might otherwise appear final. Instead, the Court of Appeals held that the trial court had abused its discretion in refusing to award relief under Utah R. Civ. P. 60(b)(6), where the party had no notice of the entry of judgment. Id. at ¶12.

memorandum decision, practicioners will have to play a guessing game to divine the court's intentions. This case demonstrates just how prejudicial the results of such a game can be on parties to litigation - A correct guess allows the case to proceed, while an incorrect guess scuttles appeal rights. Whereas simple application of Rule 7(f) does away with the potential for inconsistent conclusions.

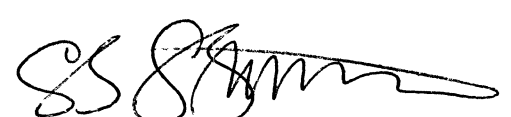
In this case, the trial court issued a memorandum decision, which falls squarely under the procedure spelled out by Utah R. Civ. P. 7(f)(2). The memorandum decision did not bring finality to the case, but consistent with the rule, required the preparation of an order by the Defendant as prevailing party because the district court did not otherwise direct. When no such order was prepared, Plaintiff prepared an order in conformity with the trial court's decision, which was signed by the trial court notwithstanding Defendant's finality objections, and timely appealed therefrom. A further order was contemplated and required by Rule 7(f). Plaintiff's order prepared pursuant thereto, once signed by the trial court, constituted the final order for purposes of the Rules of Appellate Procedure. Plaintiff's timely appeal therefrom vested the Court of Appeals with jurisdiction. The decision of the Court of Appeals holding to the contrary should be reversed by this Court.

Conclusion

A determination of the jurisdiction of the Court of Appeals in this matter requires simple application of the plain language of Utah R. Civ. P. 7(f). The district court's memorandum decision did not bring finality to the case because it did not so explicitly direct. Under Rule 7(f), given the absence of contrary indication from the district court, counsel was required to prepare an order to confirm the direction of the district court. Given Defendants' failure to prepare a proposed order as required by rule, Plaintiff's counsel appropriately prepared an order for the district court's signature to conform to Rule 7(f)'s requirement. This order was the final order in the case, and Plaintiff timely filed its appeal subsequent to its entry. The opinion of the Court of Appeals determining that it lacked jurisdiction was incorrect as a matter of law, and should be accordingly reversed.

DATED this 18th day of August, 2006.

STEVENSON & SMITH, P.C.



Brad C. Smith
Benjamin C Rasmussen
Attorneys for Plaintiff

Certificate of Mailing

I hereby certify that on this 18th day of August, 2006, I mailed, postage prepaid, two true and correct copies of the foregoing Appellant's Brief, to the following individuals:

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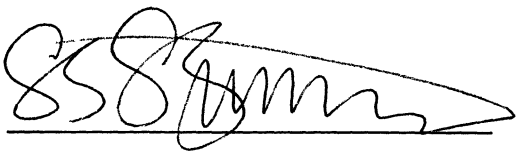

Exhibit A

Order on Petition for Writ of Certiorari
April 24, 2006

IN THE SUPREME COURT OF THE STATE OF UTAH

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Nicole H. Code, f.k.a.
Nicole L. Handrahan,

Plaintiff/Petitioner,

v.

Case No. 20060372-SC
20050255-CA

Utah Department of Health and
Utah School for the Deaf and Blind,

Defendants/Respondents.

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on April 24, 2006.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted only as to the following issue:

> Whether the court of appeals lacked appellate jurisdiction to adjudicate the appeal in this case.

A briefing schedule will issue hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

FOR THE COURT:

June 30, 2006
Date

Christine M. Durham
Chief Justice

Exhibit B
District Court Memorandum Decision
January 10, 2005

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

NICOLE H. CODE, f.k.a NICOLE L. HANDRAHAN, Plaintiff, vs. UTAH DEPARTMENT OF HEALTH, and UTAH SCHOOL FOR THE DEAF AND BLIND, Defendants.	MEMORANDUM DECISION Judge Ernie W. Jones Case No. 040905007

Plaintiff commenced this action claiming that Defendant Utah School for the Deaf and Blind ("USDB") wrongfully terminated her employment without allowing her the notice and grievance procedures. According to the Plaintiff, USDB terminated her as it would have terminated a temporary employee, although it should have treated her as a permanent employee. Plaintiff claims that her former employer, Defendant Utah Department of Health, failed to update her employment status properly prior to her lateral transfer to the USDB.

Defendants move to dismiss the complaint, arguing that (1) Plaintiff was a statutory employee rather than a contractual employee and, thus, cannot prevail on a contractual theory; (2) as a statutory employee, her wrongful termination claim arises from the Utah Personnel Management Act ("PMA"), Utah Code Ann. §§ 67-19-1 to 67-19-42, statute, and, thus, Plaintiff's failure to commence the claim within three years of its accrual bars it as untimely

under Utah Code Ann. § 78-12-26(4); and (3) the Governmental Immunity Act ("GIA") also bars Plaintiff's wrongful termination action because she failed to file a notice of claim, Utah Code Ann. § 63-30-12 (2000).

For her part, Plaintiff argues that, because the USDB treated her as a temporary employee, which the PMA exempts from its career service protections against termination without sufficient cause, Utah Code Ann. § 67-19-15(1)(l), § 67-19-18, her employment arose not from statute but from a contract expressed by the State Human Resources Employee Handbook. Thus, Plaintiff argues, her cause of action is contractual, and she timely commenced it within the four-year statute of limitations for actions arising from a contract. Utah Code Ann. § 78-12-25(1). Further, Plaintiff argues that Utah Code Ann. § 62-30-5 exempts her breach of contract claim from the GIA's notice requirement.

The Court grants Defendants' motion under Rule 12(b)(6) because Plaintiff has failed to state a claim upon which relief may be granted.

If Plaintiff's claim is true that she was a permanent employee and that the USDB had to follow termination procedures and hear her grievances as required by the PMA, then her claim is statutory rather than contractual, and it must fail because it was not brought within the three-year statute of limitations period and she did not file the notice of claim as required under the GIA.

On the other hand, if Plaintiff's claim that she was a permanent employee was mistaken, then her wrongful termination claim must fail because, as a temporary employee, she had no right to insist upon the statutory grievance procedures that the PMA provides. Further, because the

PMA requires the State to establish rules for personnel management, Utah Code Ann. §§ 67-19-6 to 67-19-10, a human resources employee handbook explaining those rules cannot create a contractual obligation outside of the authorization of the PMA, and, thus, Plaintiff's claim still must arise under the authority of the PMA.

Plaintiff correctly notes that a personnel policy manual can form the basis for a contract. See Thurston v. Box Elder County, 835 P.2d 165, 169 (Utah 1992) (holding that "[e]mployees necessarily rely on a county's statement of procedures governing layoffs and conduct themselves accordingly," and "the expectations created by a personnel policies manual justify such a reliance."). However, even if the employee handbook is sufficient to form the basis of a contractual obligation, as the embodiment of the rules adopted by the State Department of Human Resource Management ("the Department") as authorized by the PMA, the handbook does not alter or amend the terms of public employment under the PMA. Because the PMA relies upon the Department to create rules enumerating the specific terms of employment PMA for some classes of employees, the PMA essentially incorporates those rules, and thus, they cannot alter or amend the terms of employment under the PMA. Therefore, the handbook has no impact on the Plaintiff's status as a statutory employee. Although Plaintiff arguably might maintain a suit to enforce the terms of the employee handbook, as a statutory employee, her claim would arise from the PMA rather than from a contract for purposes of the statute of limitations and the GIA.

Thus, even if the Court takes the allegations of Plaintiff's claim as true, her failure to file a timely notice of claim under the GIA and her failure to commence her action within three years of its accrual deprive the Court of jurisdiction.

For the reasons stated above, the Court dismisses Plaintiff's claim.

Dated this 10 day of January, 2005.

Ernie W. Jones, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 10 day of January, 2005, I sent a true and correct copy of the foregoing ruling to counsel as follows:

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Deputy Court Clerk

Exhibit C
District Court Order for Dismissal
February 25, 2005

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Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
OGDEN DEPARTMENT, STATE OF UTAH

NICOLE H. CODE, f.k.a. NICOLE L. HANDRAHAN, Plaintiff, vs. UTAH DEPARTMENT OF HEALTH, and UTAH SCHOOL FOR THE DEAF AND BLIND, Defendants.	**ORDER** MAR 0 1 2005 Civil No. 040905007 Judge Ernie W. Jones

This matter came before the Court on Defendant's Motion to Dismiss pursuant to Utah R. Civ. 12(b)(6). The Court having been fully apprised of this matter and having issued its Memorandum Decision dated 10 January 2005, and based therefore, the Court orders that Plaintiff's claims are dismissed with prejudice

DATED this 25 day of February, 2005.

District Court Judge

Exhibit D
Order of Court of Appeals
May 19, 2005

THE UTAH COURT OF APPEALS

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Nicole H. Code, fka Nicole L. Handrahan Plaintiff and Appellant, v. Utah Department of Health and Utah State School for the Deaf and Blind, Defendant and Appellee.	)	ORDER Case No. 20050255-CA

This matter is before the court on Appellees's motion for summary disposition for lack of jurisdiction.

Appellee contends the Memorandum Decision of January 10, 2005 was a final, appealable judgment, and the notice of appeal was not timely. Appellant contends that the memorandum decision was not a final order pursuant to rule 7(f) of the Utah Rules of Civil Procedure, and that the appeal was timely filed within thirty days of entry of the February 25, 2005 order of dismissal. We defer a ruling on the jurisdictional issues raised in the motion and response pending full briefing of the appeal and consideration by the court. See Utah R. App. P. 10(f) ("As to any issue raised by a motion for summary disposition, the court may defer its ruling until plenary presentation and consideration of the case.")

IT IS HEREBY ORDERED that the motion for summary disposition is denied, and a ruling on the issues raised therein is deferred pending plenary presentation and consideration of the case. The appeal shall proceed to the next stage.

Dated this 19 day of May, 2005.

FOR THE COURT:

Judith M. Billings,
Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that on May 19, 2005, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

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Dated this May 19, 2005.

By Beth A. Lechota
Deputy Clerk

Case No. 20050255
District Court No. 040905007

Exhibit E
Court of Appeals Opinion
March 23, 2006

IN THE UTAH COURT OF APPEALS

----ooOoo----

Nicole H. Code fka Nicole L. Handrahan, Plaintiff and Appellant, v. Utah Department of Health and Utah School for the Deaf and Blind, Defendants and Appellees.	MEMORANDUM DECISION (For Official Publication) Case No. 20050255-CA F I L E D (March 23, 2006) 2006 UT App 113

Second District, Ogden Department, 040905007
The Honorable Ernest W. Jones

Attorneys: Brad C. Smith and Benjamin C. Rasmussen, Ogden, for Appellant
Mark L. Shurtleff, Debra J. Moore, and Brent A. Burnett, Salt Lake City, for Appellees

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Before Judges Bench, McHugh, and Orme.

ORME, Judge:

¶1 We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record[,] and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). We conclude we lack jurisdiction over this appeal because Appellant's notice of appeal was untimely.

¶2 Under rule 3 of the Utah Rules of Appellate Procedure, an appeal is allowed from "final orders and judgments." Utah R. App. P. 3(a). The rules also specify that the notice of appeal must be filed "within 30 days after the date of entry of the judgment or order appealed from." Utah R. App. P. 4(a). Thus, the thirty-day period begins with the entry of a judgment or other final order.

¶3 "[F]or a judgment to be final and start the time for appeal to run, there must be a judgment which is definite and

unequivocal in finally disposing of the matter." Utah State Bldg. Bd. v. Walsh Plumbing Co., 16 Utah 2d 249, 399 P.2d 141, 144 (1965). The district court's Memorandum Decision here was just such a disposition, explicitly dismissing Appellant's claim. "The Utah Supreme Court has recognized that an order is final where 'the effect of the order . . . was to determine substantial rights . . . and to terminate finally the litigation' . . . ." Harris v. IES Assocs., Inc., 2003 UT App 112,¶56, 69 P.3d 297 (first and second omissions in original) (citation omitted). The parties' substantive rights in this case were definitively and unequivocally determined by the Memorandum Decision; the decision's unambiguous language was clearly intended to end the litigation.

¶4 At the end of its signed Memorandum Decision, after setting forth its thorough legal analysis, the district court concluded: "For the reasons stated above, the Court dismisses Plaintiff's claim." No further order was invited or contemplated by the terms of the Memorandum Decision, nor is such even implied by the decision's language. Cf. State v. Leatherbury, 2003 UT 2,¶9, 65 P.3d 1180 ("[W]here further action is contemplated by the express language of the order, it cannot be a final determination susceptible of enforcement.") (emphasis added). Thus, Appellant had thirty days from the date the Memorandum Decision was entered--January 10, 2005--to file her notice of appeal. The notice was not filed, however, until March 8, 2005--long after the thirty-day period had ended. We therefore lack jurisdiction to hear this appeal. See Serrato v. Utah Transit Auth., 2000 UT App 299,¶7, 13 P.3d 616, cert. denied, 21 P.3d 218 (Utah 2001).

¶5 Appellant disagrees, arguing that the relevant date to determine timeliness of the appeal is February 25, 2005, the date the district court signed the order of dismissal that she eventually submitted. The subsequent order, however, did not restart the time for appeal because the order did not alter the substantive rights of the parties in any way; it did nothing more than reiterate the dismissal already fully effectuated by the Memorandum Decision.[1] See Foster v. Montgomery, 2003 UT App 405,¶18, 82 P.3d 191 ("Where a judgment is reentered, and the subsequent judgment does not alter the substantive rights affected by the first judgment, the time for appeal runs from the

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[1]The order, in its entirety, simply states: "This matter came before the Court on Defendant's Motion to Dismiss pursuant to Utah R. Civ. P. 12(b)(6). The Court having been fully apprised of this matter and having issued its Memorandum Decision dated 10 January 2005, and based there[on], the Court orders that Plaintiff's claims are dismissed with prejudice."

first judgment.") (internal quotations and citation omitted), cert. denied, 90 P.3d 1041 (Utah 2004).

¶6 Appellant additionally argues that the January 10 order was not final because further action was required by rule 7 of the Utah Rules of Civil Procedure, which provides that "the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision." Utah R. Civ. P. 7(f)(2). This, however, is simply the default rule that applies to those situations where responsibility for preparation of the court's order has not been "otherwise directed by the court."[2] Id. When the court issues its own Memorandum Decision, which explicitly and unambiguously dismisses the underlying claim without inviting submission of a further order, it leaves nothing more to be done. Such clear action by the trial court necessarily serves under rule 7(f)(2) as direction from the court that the prevailing party need not draft an order, and thus renders the Memorandum Decision final and appealable.

¶7 Accordingly, we dismiss for lack of jurisdiction.

_____
Gregory K. Orme, Judge

¶8 I CONCUR:

_____
Russell W. Bench,
Presiding Judge

McHUGH, Judge (concurring):

¶9 I concur in the main opinion. I write separately to address the possible confusion created by the conflict between the controlling precedent and the Utah Rules of Civil Procedure. The

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[2]Appellant's reliance on the plain language of rule 7 is paradoxical at best, as Appellant was not "the prevailing party" and did not submit her proposed order "within fifteen days after the court's decision." Utah R. Civ. P. 7(f)(2). Nor did the district court "direct[]" Appellant, rather than the prevailing party, to submit an order. Id.

cases from this court and the Utah Supreme Court that are cited by the majority hold that a decision of the trial court that fully determines the substantive rights of the parties is final for purposes of appeal absent express language to the contrary. See State v. Leatherbury, 2003 UT 2,¶9, 65 P.3d 1180; Harris v. IES Assocs., 2003 UT App 112,¶56, 69 P.3d 297.

¶10 However, rule 7(f) of the Utah Rules of Civil Procedure provides, in relevant part:

> (f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. . . .
>
> (f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

Utah R. Civ. P. 7(f)(1)-(2) (emphasis added).[1]

¶11 Thus, while the clear precedent from Utah appellate courts holds that a decision of the trial court is final for purposes of appeal unless the written decision expressly requires further action, see Leatherbury, 2003 UT 2 at ¶9; Harris, 2003 UT App 112 at ¶56, rule 7(f) contemplates that a subsequent order will be entered after every decision unless the court directs otherwise, see Utah R. Civ. P. 7(f). The presumption under the Utah Supreme

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[1]The substance of what is now rule 7(f) of the Utah Rules of Civil Procedure was previously contained in the Utah Code of Judicial Administration. See Utah R. Jud. Admin. 4-501 to 4-509 (noting that rule 4-504 was repealed effective November 1, 2003, and replaced with a comparable provision in the Utah Rules of Civil Procedure). Effective November 1, 2003, subpart (f) was added to rule 7 of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 7 & amendment notes (providing that the 2003 amendment, which added subpart (f), became effective November 1, 2003).

Court authority is in favor of finality, while the presumption in rule 7(f) is that a further order is required. Although the case law specifically addresses the issue of finality for purposes of appeal, while the rule is concerned with appropriate procedure, the interaction between the two can lead to confusion for practitioners.

¶12 The timely filing of a notice of appeal is jurisdictional. See Serrato v. Utah Transit Auth., 2000 UT App 299,¶7, 13 P.3d 616. Consequently, correctly assessing the time at which a decision becomes final for purposes of appeal is critical. Because the procedure set forth in rule 7(f) may lull practitioners into the mistaken belief that a decision of the trial court does not become final for purposes of appeal until an order is entered, clarity in the initial memorandum decision is essential. I believe the better practice for all concerned is for the decision to state expressly either that "no further order is necessary" or that the prevailing party "shall prepare an order implementing this court's decision."

¶13 I agree with the majority that the Memorandum Decision here completely resolved the substantive rights of the parties, dismissed the complaint, and did not expressly require any further action. Yet, I am sympathetic to the difficulty in assessing the proper moment when the decision becomes final for purposes of appeal when the trial court is silent on that issue.

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Carolyn B. McHugh, Judge